Trujillo v. Apple Computer, Inc. et al Doc. 124

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

JOSE TRUJILLO, individually and on behalf of all others similarly situated,

Plaintiff,

v.

APPLE COMPUTER, INC., a California corporation, and AT&T MOBILITY LLC, a Georgia corporation,

Defendants.

CASE NO.: 07-CV-04946

Judge Kennelly

**DEFENDANT APPLE INC.'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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## I. INTRODUCTION

The core premise of plaintiff's complaint is that Apple Inc. failed to disclose that the battery in his iPhone may need to be replaced and cannot be replaced by the user. Plaintiff now *concedes* that Apple disclosed that the iPhone battery may need to be replaced and was not user-replaceable. Indeed, these disclosures are on each and every iPhone box. In a feeble effort to resurrect a claim, plaintiff now resorts to the argument that Apple did not adequately disclose the costs and details of its post-warranty Battery Replacement Program ("BRP"). There are two fundamental problems with plaintiff's theory. First, Apple *did* disclose the costs and details of the BRP at the time the product went on sale and before plaintiff purchased his iPhone. Second, even if Apple had *not* made these disclosures, plaintiff would still not have a cause of action. The law does not require manufacturers to disclose at the time of initial sale the cost for each consumable part that might need replacement after the product is out of warranty.

This is a summary judgment motion. Accordingly, plaintiff must come forward with evidence creating a dispute of material fact. A careful analysis of the "evidence" he submits shows that every fact identified in Apple's moving papers remains uncontroverted. Applying the law to these undisputed facts reveals that plaintiff fails to establish at least one element of each of his claims. Accordingly, applicable law requires that summary judgment be granted.

## II. SUMMARY JUDGMENT STANDARD

"When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed. R. Civ. P. 56(e)(2). "[T]he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

This standard compels summary judgment here. Apple's motion was properly supported, setting out specific facts in declarations demonstrating that plaintiff fails to establish at least one element of each of his causes of action. Plaintiff's affirmative burden was to come forward with specific facts supporting his position that there is a genuine dispute, and to do so with competent proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920-21 (7th Cir. 1994); *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988). Plaintiff here offers neither specific facts nor competent proof. Rather, he offers a hodgepodge of largely inadmissible evidence that — even if it were admissible — fails to create a genuine issue of disputed fact.

## III. PLAINTIFF'S RULE 56.1 RESPONSE STATEMENT FAILS TO SET FORTH ANY COMPETENT PROOF CONTRADICTING APPLE'S UNDISPUTED FACTS.

Plaintiff's Rule 56.1 Statement does not meet the standard set forth above. Plaintiff's Rule 56.1 Statement and many of its cited exhibits are improper and should be disregarded. Plaintiff repeatedly fails to cite specific supporting evidence — or, in many instances, *any* evidence — as required by Rule 56.1. In addition, the majority of the "evidence" plaintiff does submit should be excluded because it is unauthenticated, hearsay, and irrelevant to the issues for which it is offered. Apple's accompanying Reply to Plaintiff's Rule 56.1 Statement asserts specific objections which will not be detailed here, but certain global shortcomings merit comment.

First, plaintiff has in almost every instance failed to provide specific citations to the allegedly supporting evidence. He repeatedly cites without more a "Group Exhibit," Exhibit A, consisting of nine separate documents. Likewise, he repeatedly cites Apple's responses to Plaintiff's Special Interrogatories, Exhibit H, without identifying any specific interrogatory response. Plaintiff also frequently cites multiple exhibits without specifying which parts are allegedly relevant, e.g., "as evidenced by Group Exhibit A, and Exhibits H-M." This failure to specify supporting evidence is prohibited by the governing rules and fails to satisfy plaintiff's burden of coming forward with specific facts. *See, e.g.*, *Brasic v. Heinemann's Inc.*, 121 F.3d 281, 285 (7th Cir. 1997) (explaining that the rules require specific references to affidavits and parts of the record; therefore, plaintiff's reference to "see all exhibits" was insufficient); *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003) (affirming summary judgment for defendant because plaintiff's attempt "to support his factual disagreements by affixing to his brief assorted material" was insufficient under Local Rule 56.1).

Second, much of plaintiff's evidence is unauthenticated hearsay that is patently inadmissible under Federal Rules of Evidence rules 802, 901, and 902. *See Randle v. LaSalle*

*Telecomm, Inc.*, 876 F.2d 563, 570 (7th Cir. 1989). For example, plaintiff's Exhibit G purports to be a June 29, 2007 letter from a Harvey Rosenfield to Steve Jobs at Apple. This letter has not been authenticated as required by Federal Rules of Evidence rule 901(a) and is offered for the truth of the statements it contains, in violation of Federal Rules of Evidence rule 802. Likewise, "Group Exhibit A" contains the same Rosenfield letter and eight other documents, all of which are unauthenticated and hearsay, and many of which contain double-hearsay statements. All of these exhibits must be stricken.

Finally, plaintiff repeatedly cites exhibits that are completely irrelevant to the issues or undisputed facts in question and, thus, inadmissible under Federal Rules of Evidence rule 402. These relevance issues are specifically addressed in the appropriate sections below and in Apple's Reply to Plaintiff's Rule 56.1 Statement.

## IV. APPLE IS ENTITLED TO SUMMARY JUDGMENT AS TO EACH OF PLAINTIFF'S CLAIMS.

### A. Plaintiff Cannot Satisfy the Required Elements of the Illinois Consumer Fraud Act.

Plaintiff cannot sustain his claim under the Consumer Fraud Act ("CFA"). Apple's moving papers put forth competent evidence demonstrating that Apple publicly disclosed all the information allegedly omitted: (1) that the iPhone battery is not user-replaceable, (2) that the battery has a limited lifespan, and (3) the costs and details of the BRP. These disclosures preclude the requisite finding of a "deceptive act" or "intent to induce reliance."

Plaintiff's opposition brief does not even discuss the first two alleged omissions, although they are clearly the core allegations of his complaint and are prominently featured therein. On the contrary, plaintiff has *conceded* that there was no concealment of the fact that the iPhone battery is not user-replaceable, or of the fact that the battery has a limited lifespan and may eventually need to be replaced. Indeed, plaintiff's brief quotes the disclosure of this information made on every iPhone box (*see* Plaintiff's Opposition ("Pltf.'s Opp.") at 5), and he submits the box feature label as plaintiff's Exhibit C. Plaintiff having abandoned these claims, this Court need not consider them any further.

Plaintiff's opposition instead retreats exclusively to the theory that Apple failed at the time of initial sale of the iPhone to adequately disclose the costs and details of Apple's post-warranty BRP. However, summary judgment is compelled on his CFA claim because plaintiff has failed to bring forward (1) any evidence to contravene Apple's evidence that it did publicly disclose the costs and terms of the BRP on June 29, 2007, when the iPhone first went on sale, or (2) any evidence that the post-warranty BRP costs or program details were material such that disclosure was even required.

### 1. Plaintiff Did Not Establish Any Deceptive Act Relating to the Costs or Terms of the BRP.

Plaintiff has presented no competent evidence that Apple concealed the costs or terms of the BRP at the time he purchased his iPhones. Tellingly, plaintiff has not even introduced a declaration stating that he was unaware of these facts when he purchased his iPhones (nor did he even allege it in his complaint). Instead, plaintiff has submitted: (1) a number of documents concerning the time period *before the iPhone went on sale*; (2) an ambiguous hearsay press account that itself shows the BRP disclosures were made *before plaintiff purchased his iPhones*; and (3) naked argument that Apple's disclosures were "hidden" despite being publicly posted on Apple's website. None of this is sufficient to create a dispute of material fact on a motion for summary judgment.

### 2. Documents from the Time Period Before the iPhone Went on Sale Are Irrelevant Because the BRP Disclosures Were Made when the iPhone Went on Sale.

Plaintiff has cited several documents that pre-date the June 29, 2007 introduction of the iPhone and Apple's contemporaneous BRP disclosures. For example, plaintiff's Exhibits A (pages 1-2) and G are the same unauthenticated, hearsay letter from Harvey Rosenfield dated June 29, 2007. The text of that letter acknowledges that it is "[b]ased on the information available early this morning with respect to the 6 p.m. inauguration of the iPhone program." (*See* Pltf.'s Opp. Ex. G at 1, ¶ 3.) Likewise, plaintiff cites several unauthenticated, hearsay press articles that are *dated* after the iPhone's release but that simply report the contents of this pre-release Rosenfield letter. (*See* Pltf.'s Opp. Ex. A at 2-6, and 8-10.) Finally, plaintiff cites internal Apple emails concerning decisions not to respond to press inquiries on June 7 and June 28, 2007 — *before the iPhone went on sale*. (*See* Pltf.'s Opp. Exs. I-K.)

These exhibits are irrelevant. They concern the time period *before the iPhone went on sale*. But Apple had no obligation to make disclosures before the iPhone's introduction, and Apple does not contend its disclosures were posted before the iPhone's introduction. Rather, Apple posted its BRP disclosures in the late afternoon of June 29, 2007, contemporaneously with the 6 p.m. start of iPhone sales. (*See* Pltf.'s Opp. Ex. H at 9-10.) Accordingly, these exhibits, most of which are inadmissible, do not contradict Apple's evidence or create a dispute of material fact concerning the disclosures actually made when the iPhone went on sale. Finally, for purposes of Apple's motion for summary judgment, the issue is whether the disclosures were available *at the time plaintiff bought his first iPhone* on July 2, 2007 — and plaintiff does not even attempt to deny that they were.

#### a. Documents Regarding an Alleged Hakes Statement Are Double Hearsay and Irrelevant.

Plaintiff has also submitted several versions of an unauthenticated, hearsay press statement that originated with May Wong of the Associated Press on July 6, 2007, and was picked up by the other media sources cited by plaintiff. The original A.P. story stated: "Apple spokeswoman Jennifer Hakes said Thursday [*i.e., July 5*] the company posted the battery replacement details on its website last Friday [*i.e., June 29*] after the product went on sale." (*See* Pltf.'s Opp. Ex. A at 3, 5-6, and 9-10.) Plaintiff relies on the double-hearsay words "*after the product went on sale*" to claim the BRP disclosures were not timely, but the date of Ms. Wong's report makes it clear that she was reporting that the disclosures were made *on the same day* the iPhone was introduced, *i.e.*, "last Friday" or June 29, 2007. This confirms rather than contradicts Apple's evidence that the disclosures were posted that day.

At most, this ambiguous press statement could be read to suggest that the disclosures were made on the same day the iPhone went on sale, but after sales commenced. Even with that strained reading, such "evidence" would be irrelevant because plaintiff did not buy his first iPhone until several days later on July 2, 2007. (*See* Plaintiff's iPhone receipt, Declaration of Andrew Muhlbach in Support of Apple's Motion for Summary Judgment ("Muhlbach Decl.") Ex. B.)

This A.P. story demonstrates the danger of relying on hearsay. The language relied upon by plaintiff is not a direct quotation attributed to Ms. Hakes, and was, in fact, never uttered by her. Although it is not material to this dispute, Apple wants the record to be clear that there is no merit to this contention. Therefore, Apple has attached the Declaration of Jennifer Hakes in which she makes it clear that she never said the disclosures were made after the product went on sale.[1] (Declaration of Jennifer Hakes in Support of Apple's Motion for Summary Judgment ¶ 4.)

#### b. Plaintiff Has Neither Evidence or Authority for His Arguments Concerning Apple's BRP Disclosures.

Plaintiff argues that, even if the BRP disclosures were made, they were "hidden" — although they were posted on the World Wide Web for anyone to access. Apple's disclosures were not hidden or "purposefully concealed." On the contrary, plaintiff concedes that every consumer was directed to www.apple.com/batteries by the label *on every iPhone box*. That web page contained two blue-colored, underlined hyperlinks in two separate sentences addressing the potential need for future battery replacement: "As with other rechargeable batteries, you may eventually need to replace your battery" and "Battery lifespan means the total amount of time your battery will last before it must be replaced." The words "replace" and "replaced" in these sentences, underlined in blue text, set apart from the surrounding black text, were obvious active links that would take any consumer seeking battery replacement information to www.apple.com/batteries/replacements.html, Apple's main battery replacement web page.[2] (*See* Pltf.'s Opp. Ex. H at 17-18; Vincent Decl. ¶ 6, Ex. A.) That battery replacement web page explicitly states:

> **iPhone Owners.** Your one-year warranty includes replacement coverage for a defective battery. . . . If it is out of warranty, Apple offers a battery replacement for $79, plus $6.95 shipping, subject to local tax.

(Vincent Decl. ¶ 9, Ex. B.) The blue-colored phrase "battery replacement" in the above text is also an obvious active link for any consumer to use if interested in even *more* information about battery replacement. Clicking on this phrase brings up www.apple.com/support/iphone/service/battery, which contains additional details, including the

[1] In April 2008, plaintiff noticed Ms. Hakes's deposition. (Muhlbach Decl. ¶ 2, and Ex. A). Apple's counsel informed plaintiff's counsel that Ms. Hakes would testify that she had not made the statement attributed to her by the A.P. report. (*Id.* at ¶ 4.) Plaintiff elected not to take her deposition. (*Id.* at ¶ 5.)

[2] Color copies of these web pages were submitted to the Court as Exhibits A and B to the Declaration of Douglas Vincent with Apple's opening brief. Plaintiff's versions of these pages are not in color.

costs (again), the handling of data on the iPhone during service, and the service time.[3] (Pltf.'s Opp. Ex. H at 17-18; Kunnuth Decl. ¶ 4, Ex. A.)

Plaintiff's arguments that these disclosures were "hidden" are unsupported by any evidence and belied by the ease with which a consumer could navigate Apple's pages. Further, any consumer interested in information about the BRP also could have found it by typing "battery replacement" or any similar term into the search box at the top right corner of Apple's website. Against these facts, it is notable that plaintiff has not declared that he was unable to locate the BRP costs and details. Rather, plaintiff's position seems to be that Apple was legally required to somehow cram the universe of its extensive battery information on to a single webpage. While technically feasible, that would have been neither logical nor desirable. That approach would require all viewers to scroll through pages and pages of text, making the information *less* obvious than Apple's clear and intuitive linking of multiple pages of information.

Finally, plaintiff has provided no authority to support the argument that Apple's public internet postings coupled with on-box statements were legally insufficient. On the contrary, Apple has cited cases which held that disclosures less accessible than those made here were sufficient to defeat a CFA claim. *See, e.g.*, *Charles Hester Enters., Inc. v. Illinois Founders Ins. Co.*, 137 Ill. App. 3d 84, 99, 484 N.E.2d 349, 360 (Ill. App. Ct. 1985) (rate schedules on file with Department of Insurance); *Perona v. Volkswagen of Am., Inc.*, 292 Ill. App. 3d 59, 684 N.E.2d 859 (Ill. App. Ct. 1997) (two press releases). Having publicly disclosed all BRP information, Apple is entitled to summary judgment on the CFA claim due to the absence of any disputed material fact regarding plaintiff's allegations of concealment or intent to induce reliance.

**3. Plaintiff Cannot Establish Materiality of the BRP.**

Apple is entitled to summary judgment for the additional reason that the costs and terms of the BRP are not "material." To state a claim under the CFA, plaintiff must allege and prove the misrepresentation or concealment of a "material" fact. *Mackinac v. Arcadia Nat'l Life Ins.*

[3] Plaintiff points to an Apple email to argue that the links on the battery pages were not active. (*See* Pltf.'s Opp. Ex. L.) However, that e-mail has nothing to do with the disclosures at issue. It clearly states that a *service* link was not active on August 6, 2007. The service link was to an "iPhone service request form" that would allow users to initiate an out-of-warranty repair. As the e-mail makes clear, the link was not active because there would be no need for out-of-warranty repairs until eleven months later (when the first units sold started coming out of warranty in late June 2008).

*Co.*, 271 Ill. App. 3d 138, 141, 648 N.E.2d 237, 239 (1995). "An omission is 'material' if the plaintiff would have acted differently had she been aware of it, or if it concerned the type of information upon which she would be expected to rely in making her decision to act." *Id.*

While his opposition repeatedly asserts that the costs and terms of Apple's BRP are "material," plaintiff has utterly failed to introduce any evidence to establish materiality. For example, plaintiff has not declared that he would not have purchased the iPhone if he had known the price or terms of the BRP. Nor has plaintiff introduced any evidence to establish that this is the kind of information he or others would be expected to rely on in making a phone purchase. This failure of proof is fatal to plaintiff's claim.

Moreover, it is evident that this information is not material. The BRP is nothing more than a part replacement service for products that are no longer covered by warranty. If the costs and terms of such replacement service were considered material, every manufacturer would be in violation of the CFA. It is common experience that manufacturers do not make pre-sale disclosure of the charge for parts replaced outside of warranty. If the law required that type of disclosure, a complex product like an iPhone would need a refrigerator-sized box to list the cost of every potential replacement part. It is equally common experience that manufacturers do not replace consumable parts (e.g., batteries, tires, filters, razor blades, printer cartridges) free for the life of a product. Far from being "material," the fact that Apple will charge you to provide a new battery for your iPhone (if the original battery dies after the warranty expires) is expected and unremarkable.[4]

The allegedly concealed information in this case is nothing like the omissions assumed to be material in the cases cited by plaintiff. Those omissions were not expected facts and directly reduced the value of the property at issue. *See, e.g., Miller v. William Chevrolet/Geo, Inc.*, 326 Ill. App. 3d 642, 649-50, 762 N.E.2d 1, 7-8 (2001) (fact that vehicle sold was previously used as rental car); *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 618-19 (7th Cir. 1989) (absence of natural gas in gas field used as loan collateral); *id.* at 619 (example of termite damage to a residence sold illustrative of materiality). Plaintiff's failure to introduce facts establishing materiality also entitles Apple to summary judgment on plaintiff's CFA claim.

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[4] Contrary to plaintiff's implication, Apple's BRP is not the only consumer option for replacing an iPhone battery after the warranty has expired. Since the introduction of the iPhone, at least two companies unaffiliated with Apple have begun offering battery replacements for iPhones. (*See* Muhlbach Declaration ¶ 7, and Exs. C-D.)

### B. Plaintiff Cannot Establish the Required Elements for Fraudulent Concealment.

Plaintiff's common law fraudulent concealment claim requires him to prove:

> (a) the concealment of a material fact;
>
> (b) that the concealment was intended to induce a false belief, under circumstances creating a duty to speak;
>
> (c) that the innocent party could not have discovered the truth through a reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and relied upon the silence as a representation that the fact did not exist;
>
> (d) that the concealed information was such that the injured party would have acted differently had he been aware of it; and
>
> (e) that reliance by the person from whom the fact was concealed led to his injury.

*See, e.g.*, *Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd.*, 946 F. Supp. 1358, 1367 (N.D. Ill. 1996); *Kelly v. Sears Roebuck & Co.*, 308 Ill. App. 3d 633, 644-45, 720 N.E.2d 683, 692-93 (1999). Plaintiff has failed to introduce evidence on any of these elements. Failure to do so, even as to a single element, entitles Apple to summary judgment.

It is now uncontroverted that at the time the iPhone went on sale, and prior to plaintiff's purchase several days later, Apple disclosed all of the information alleged to have been concealed. *See* § IV.A. Those disclosures preclude any finding of concealment, intent to deceive, or proximate cause. Plaintiff has also failed to introduce evidence that he relied on any alleged omission. Each of these factors independently warrants summary judgment.

Likewise, while plaintiff argues about the placement of disclosures concerning the costs and terms of Apple's BRP, he has not introduced any evidence that he "could not have discovered the truth through a reasonable inquiry or inspection" or was prevented from doing so. *See Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 882 (7th Cir. 2005) (ruling that reliance could not be established as a matter of law because plaintiff had ample opportunity to read materials disclosing the allegedly concealed information); *Charles Hester Enters.*, 137 Ill. App. 3d at 94, 484 N.E.2d at 357 ("When [plaintiff] is afforded the opportunity of knowing the truth of the representations, he is chargeable with knowledge; and if he does not avail himself of the means of knowledge open to him, he cannot be heard to say he was deceived by misrepresentations.").

Apple's disclosures were placed on its public website with other information about the iPhone and were easily locatable had plaintiff made a reasonable inquiry or inspection. Indeed, there is no evidence that plaintiff made any effort to discover such information at all. This failure also dictates summary judgment for Apple.

Finally, summary judgment on the fraudulent concealment claim is warranted by the absence of any legal duty by Apple to disclose the allegedly concealed facts. Plaintiff apparently concedes that the parties do not have a fiduciary or other relationship that requires disclosure. Instead, plaintiff's opposition argues that the alleged "materiality" of the BRP costs and terms imposes a common law duty to disclose. Obviously, there are circumstances under which the materiality of information will require its disclosure by a seller. While Apple denies that such circumstances exist in this case, it is an academic question, because plaintiff has not introduced a shred of *evidence* to establish that the BRP costs and terms were material, as explained above in Section A.3. That failure dictates summary judgment on plaintiff's fraudulent concealment claim.

### C. Plaintiff Has No Cause of Action for Breach of Implied Warranties.

#### 1. Plaintiff Was Required to Provide Apple with Notice.

Plaintiff concedes that he failed to notify Apple of any warranty breach. Notice is an essential element of any warranty claim. 810 Ill. Comp. Stat. 5/2-607(3)(a) (2007). Apple established that it received no such notice (UF 48), and plaintiff proffered no facts to the contrary. Summary judgment is proper on this basis alone.

Plaintiff's argument that he is excused from the notice requirement is squarely contradicted by the very case he cites — *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 675 N.E.2d 584 (1996). In *Connick*, the Illinois Supreme Court made it clear that notice is mandatory unless the manufacturer already has actual knowledge of an alleged defect as to the *specific* product bought by the *specific* consumer now seeking to assert a claim for breach of warranty. "Thus, even if a manufacturer is aware of problems with a particular product line, the notice requirement of section 2-607 is satisfied only where the manufacturer is somehow apprised of the trouble with the particular product purchased by a particular buyer."[5] *Id.* at 494,

[5] *Connick* also discusses the only other exception to the notice requirement — the filing of a lawsuit. However, as explained in Apple's opening brief, a lawsuit only satisfies the notice requirement if the consumer sues for personal injuries. *Id.* at 495, 675 N.E.2d at 591. This exception does not apply here.

675 N.E.2d at 591. In *Connick*, the plaintiffs attempted to use evidence of media reports and settlements to show that Suzuki knew of certain safety issues and did not have to be provided notice of a breach of warranty claim. The court flatly rejected this position and dismissed the warranty claims. Even though it was "uncontroverted that Suzuki was aware of the safety concerns," Suzuki had not received the requisite notice that a "*particular transaction* is 'troublesome and must be watched.'" *Id.* at 493, 675 N.E.2d at 590.

The same result is mandated here where plaintiff relies on the tautological assertion that Apple "had actual notice because, after all, it was [Apple] who purposefully omitted and concealed these material terms," and offers no evidence that Apple had any actual knowledge of an alleged warranty breach as to *his particular iPhone*. *See also*, *Perona*, 292 Ill. App. 3d at 63-64, 684 N.E.2d at 863 (manufacturer's press releases regarding safety issue did not satisfy the notice requirement for a breach of warranty claim where the manufacturer had no actual knowledge of an alleged breach as to "the particular automobiles purchased by the named plaintiffs"). Plaintiff was required to give notice to Apple, and the undisputed facts show that he failed to do so.

### 2. Plaintiff Has No Merchantability Claim.

Plaintiff also cannot establish that his iPhone was not merchantable — fit for the ordinary purposes for which such goods are used — at the time of sale. 810 Ill. Comp. Stat. 5/2-314 (2007). First, as set forth in Apple's opening brief, there is no merchantability claim for issues that were disclosed. *See Kaczmarek v. Microsoft Corp.*, 39 F. Supp. 2d 974, 977-78 (N.D. Ill. 1999); *Haddix v. Playtex Family Prods.*, 964 F. Supp. 1242, 1246-47 (C.D. Ill. 1997). Apple has met its burden of establishing that the details and costs of the BRP were disclosed prior to plaintiff's purchase, and plaintiff has not proffered any competent proof to the contrary. *See* § IV.A.1. Therefore, plaintiff's attempt to avoid these cases is unavailing.

Plaintiff's only other argument in support of his implied warranty claims is that his case is "aligned" with *Mandel Brothers v. Mulvey*, 230 Ill. App. 588 (1923). But *Mandel Brothers* is not even close to plaintiff's case — it involved affirmative misrepresentations by the seller as to the quality of an overcoat and how long it would last. *Id.* at 589. It is an unremarkable proposition that these affirmative representations created a warranty obligation.

That is not the case here. Plaintiff's analogy fails — "Absent its threads, the overcoat became unfit for wear; absent its battery, plaintiff's phone is unfit for use as such." Plaintiff's iPhone had a battery, and there is no claim that the battery is defective. Apple made no representations that users would never have to replace the battery or that doing so would be cost-free. Indeed, every iPhone box made it clear that the battery may eventually need to be replaced, and the costs and details of the BRP were fully disclosed.

Plaintiff attempts to predicate a warranty claim on the ordinary requirement that he pay for the replacement of a consumable part post-warranty, but this is not a concealed defect or non-conforming condition, as is required for a merchantability claim. *See, e.g., State Farm Fire & Cas. Co. v. Miller Elec. Co.*, 204 Ill. App. 3d 52, 62, 562 N.E.2d 589, 596 (1990) (implied warranty of merchantability requires existence of a defect). The fact that a consumer *might* have to pay to have an iPhone battery replaced at some point *after* the one-year warranty expires does not render the product unfit for ordinary purposes.

Further, Apple explicitly limited the duration of any implied warranties to the one-year term of the written warranty, as allowed by Illinois law. 810 Ill. Comp. Stat. 5/2-316 (2007). Since Apple replaces the battery at no cost during the one-year warranty period, there cannot be an implied warranty claim for post-warranty battery replacement. *See Sampler v. City Chevrolet Buick Geo*, 10 F. Supp. 2d 934, 941 (N.D. Ill. 1998) (implied warranty claims cannot extend to conditions that manifest after the expiration of the limited warranty); *Evitts v. Daimler-Chrysler Motors Corp.*, 359 Ill. App. 3d 504, 511, 834 N.E.2d 942, 950 (2005).

#### 3. Plaintiff Does Nothing to Support His Claim for Breach of the Implied Warranty of Fitness for a Particular Purpose.

Plaintiff does not even make any arguments — much less proffer any factual evidence — in opposition to Apple's contention that he cannot establish a claim for breach of the implied warranty of fitness for a particular purpose. As set forth in Apple's opening brief, he (1) fails to specify any particular purpose (other than ordinary use) for which he purchased the iPhone, and (2) fails to assert that he made his particular purpose known to Apple before sale and relied on Apple's skill or judgment in selecting the product. These are required elements. 810 Ill. Comp. Stat. 5/2-315 (2008); *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 64 F. Supp. 2d 741, 746 (N.D. Ill. 1999). Plaintiff's failure to set forth any evidence to support these elements in the face of Apple's summary judgment motion requires dismissal of this claim. *Lujan*, 497 U.S. at 888-89.

### D. Plaintiff Cannot Establish Breach of Contract.

Plaintiff offers only one cursory argument in support of his claim for breach of contract — that Apple did not adequately disclose the terms of its BRP. Plaintiff offers no response to Apple's opening papers, which clearly laid out the required elements of a breach of contract claim, including a contract with definite and certain terms and breach of that contract. Plaintiff has done nothing to establish that such a contract existed, nor has plaintiff come forward with competent evidence of any breach.

### E. Plaintiff Has No Basis for an Unjust Enrichment Claim.

Plaintiff concedes that his unjust enrichment claim requires that he establish wrongful conduct, such as "fraud, consumer fraud, etc." As demonstrated herein, he fails to establish essential elements of his claims for consumer fraud and fraudulent concealment; therefore, summary judgment is warranted in Apple's favor as to this cause of action as well.

### F. Plaintiff Has Abandoned His Accounting Claim.

Plaintiff's opposition makes no reference to his claim for an accounting or to Apple's arguments regarding his obvious inability to establish a basis for an accounting in this case. There is no fiduciary relationship, no fraud, and no complicated mutual accounts. *Cole-Haddon, Ltd. v. The Drew Philips Corp.*, 454 F. Supp. 2d 772 (N.D. Ill. 2006). Plaintiff, thus, has abandoned this claim.

### G. Plaintiff Cannot Satisfy the Damages Requirement for His Claims.

Plaintiff also cannot satisfy the damages requirement for any of his claims. Plaintiff now rests his theory of damages solely on the absurd proposition that he suffered diminution in the value of his iPhone because, *if* his battery fails outside the warranty period, he will have to pay for a new battery. Notably, plaintiff *does not even allege this theory in his complaint*, let alone plead any specific facts demonstrating diminution of value. Nor does he submit a declaration of any kind — his own or that of an expert — to demonstrate either the fact or the amount of any diminution in value.

Plaintiff's theory is nonsensical. By plaintiff's logic, there would be actual damage where an auto manufacturer failed to disclose, at the time of purchase, the cost of replacing each consumable part (such as a brake lining or tire) *outside* the warranty period, because this failure to disclose "diminished the value" of the product. Of course, Apple *did* disclose the costs of an out-of-warranty BRP repair. But even if it had not, failure to disclose such facts cannot be a basis for "diminution of value" under Illinois (or any other) law.

Rather, in order to rely on a "diminution of value" theory of damages, plaintiff must show that the product "contains a manifested defect or current condition affecting value." *Miller*, 326 Ill. App. 3d at 653, 762 N.E.2d at 10. Plaintiff here never alleges, let alone submits evidence, that the iPhone battery is defective. Illinois law precludes damages based on "conjecture or speculation." *Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 472, 672 N.E.2d 1287, 1295 (1996). *Miller* makes it clear what a plaintiff must do to oppose a motion for summary judgment. There, the seller of a used car concealed the fact that the car had previously been used as a rental vehicle. The court denied summary judgment because the plaintiff submitted expert evidence that rental cars had diminished value. 326 Ill. App. 3d at 654, 762 N.E.2d at 11.

Plaintiff does not meet this standard. Plaintiff does not allege that his battery has failed, or that it ever will fail. This is not a motion to dismiss, it is a motion for summary judgment. Yet plaintiff neither alleges specific facts nor submits evidence of any kind regarding *either* the likelihood that his iPhone battery will fail, or the diminution of value that allegedly results from the possibility that his iPhone *might* fail and that he *might* have to pay the costs associated with the BRP.

Rather, plaintiff's purported theory of damages falls squarely within *Kelly*, 308 Ill. App. 3d at 644, 720 N.E.2d at 692, rejecting as insufficient a damages claim that is speculative or is premised on potential harm. Plaintiff seeks to distinguish *Kelly* on the ground that in that case, not all class members received a used battery rather than a new one, so that plaintiff and the members of the alleged class did not know whether they in fact had received a used or new battery. In fact, however, the plaintiff relied on a "diminution of value" theory, just as plaintiff here seeks to do. The *Kelly* plaintiff alleged that "the fair market value of a battery known to be new is substantially greater than the fair market value of a battery that runs a substantial risk of being used." 308 Ill. App. 3d at 644, 720 N.E.2d at 692. The court rejected that theory as "speculative" and "insufficient to adequately state a compensable injury." *Id.*

*Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 472, 672 N.E.2d 1287, 1295 (1996), similarly demonstrates plaintiff's failure to meet the legal requirements for damages based on a "diminution of value" theory. There, the plaintiff alleged that the defendants' cell phones subjected the plaintiff and the purported class to increased risk of exposure to harmful or potentially harmful radio waves, and that this resulted in diminution of value. The court concluded that the plaintiff's claims constituted impermissible "conjecture and speculation" because the plaintiff failed to plead specific facts demonstrating that the telephones had diminished value, and granted a motion to dismiss.

Plaintiff's reliance on *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 675 N.E.2d 584 (1996), is misplaced. *Connick* involved a motion to dismiss, not a motion for summary judgment. Plaintiff does not meet even the lower motion to dismiss standard established in *Connick*. There, Suzuki had affirmatively represented to an automotive magazine that the Suzuki Samurai was safe. The plaintiff, however, alleged that every Samurai had design defects that subjected it to an excessive risk of rollover, and that these defects diminished its value. That is not the case here. Plaintiff does not allege that the iPhone battery is defective or prone to failure. Rather, he alleges only the unsurprising fact that *if* the iPhone battery fails outside of warranty, he will have to pay if he wants it replaced. If that is the basis for a "diminution of value" claim, then every consumer who purchases a product with consumable parts has a claim for damages based on "diminution of value." That is not the law.[6] Plaintiff utterly fails to meet the requirements for showing actual damages under Illinois law.

## V. CONCLUSION

For the reasons set forth above, Apple respectfully requests that the Court grant its motion for summary judgment as to each of plaintiff's causes of action.

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[6] Plaintiff also cites the Second Circuit's decision in *Ross v. Bank of America*, 524 F.3d 217 (2d Cir. 2008), for the proposition that the alleged diminution in value of the plaintiff's credit cards resulting from an alleged antitrust conspiracy to require arbitration of disputes constituted injury in fact. *Ross*, however, was an Article III standing case, not a case about what is required to establish damages as an element of a cause of action. When plaintiff's misleadingly edited quotation from the case is set forth in full, this much is clear. What the Second Circuit in fact said was: "Injury in fact is a low threshold, which we have held '*need not be capable of sustaining a valid cause of action*' but 'may simply be fear or anxiety of future harm.'" 524 F.2d at 222 (emphasis added). Here, by contrast, the issue is whether plaintiff has met his burden of showing damages as an essential element of each of his causes of action in opposing a *motion for summary judgment.*

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Respectfully submitted,

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